IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3293 OF 2006
IN
SUIT NO.2754 OF 2006

Ramnik Ravji Nathwani & Anr. ..Plaintiffs.

Vs.

Chunilal L. Ashok ..Defendant.

Mr.J.S.Kini i/b.Mr.Kinjal Aria for the Plaintiffs.

Mr.Manoj Kumar Upadhye for the Defendant.

CORAM : S.J. VAZIFDAR, J.
DATED : 11TH DECEMBER, 2006

P.C. :

The suit is filed for specific performance of an agreement that had allegedly been entered into between the Plaintiff and the Defendant on 11.4.2006.

2. I had by an ad-interim order dated 4.9.2006 refused ad-interim reliefs. The Appeal Court however, by an order dated 26.9.2006 did not examine the merits of the matter in view of the statement made by the counsel for the Respondent/Defendant that for a period of four weeks he shall not dispose of, sell or alienate the suit flat. The Notice of

Motion was ordered to be heard within four weeks.

3. The alleged agreement pleaded by the Plaintiff was on the basis of a writing dated 11.4.2006, the relevant part whereof allegedly reads as under :

> "1] The value of the Flat is decided between us Rs.71,31,000/- (Seventy One Lakhs Thirty One Thousand only)
>
> 2] The Deal should be completed within a months time before getting N.O.C. (No objection Certificate) from society to Sale the Flat.
>
> 3] If seller wants to complete the Deal before one month i.e. before 15th May 2006. Buyer has no objection.
>
> 4] The Permission will be given on full and final payment of the value decided by with the parties.
>
> 5] The Bank pay of seller side will be born by seller and both of buyer would be paid by buyer and transfer charges of society will be born 50%-50% by seller and buyer.
>
> 6] The stamp duty Registration charges will be Born by Purchaser.
>
> 7] Buyer Mr.Ramnik Ravji Nathwani has paid cheque No.528923 of Bank of Maharashtra Thakurdwar Branch Mumbai - 2 Dated 26-3-2006 of Rs.1,31,000.00 (Rs. One Lacks Thirty One Thousand Only)" (emphasis supplied).

4. The first question is whether the consideration of Rs.71,31,000/- was filled-in in the original or whether the consideration was left blank. At the ad-interim stage, the Defendant had produced a xerox copy of the original. It is not disputed that the xerox copy is of the original, relied upon by the Plaintiff. The xerox copy tendered by the Defendant is still in the record of this Court. The same is marked ‘X’ for identification today. The value mentioned in clause 1 is left blank. Prima-facie, therefore, it is clear that in the original the consideration was subsequently filled in.

5. The Plaintiff’s contention is that a copy of Annexure "A" to the suit filed in the Bombay City Civil Court was furnished to the Defendant and that the Defendant may have made the xerox copy tendered by him in Court after blanking out the consideration in clause 1.

6. A perusal of the xerox copy does not indicate any such blanking out. Further, it is pertinent to note that the copy of Annexure "A" in the City Civil Court has written on the top "Annexure "A". The copy tendered by the Defendant in this Court does

not state the same.

7. Faced with this, Mr.Kini submitted that the same may also have been blanked out by the Defendant. He fairly conceded that he was not able to positively state whether the Defendant had, in fact, blanked it out.

8. In respect of this contention, I had, in the ad-interim order dated 4.9.2006 observed as follows:

> "8. It is difficult to accept this contention. The original admittedly is with the Plaintiff. The Plaintiffs do not deny having given a photo copy to the Defendant. The Plaintiffs have offered no explanation as to how the photo copy was made. The Plaintiffs have not even mentioned as to who made the photo copy. It is not the Plaintiffs' case that they parted with possession of the original to enable the Defendant to make a photo copy."

Even today, though an affidavit in rejoinder has been filed, there is not even a statement to the effect as to whether when the alleged writing dated 11.4.2006 was prepared, the Plaintiff gave a copy thereof to the Defendant. Nor is it the Plaintiff's case even today that he parted with possession of

the original to enable the Defendant to make a photo copy.

9. Thus, the prima-facie view taken in the order dated 4.9.2006 is stronger at the hearing of the Notice of Motion. I am of the view, therefore, that the Defendant has made out a strong prima-facie case that the figure of Rs.71,31,000/- was inserted subsequently in the said writing.

10. There is an equally, if not more important, aspect of the matter which would deny the Plaintiff any interim reliefs. The alleged writing is dated 11.4.2006 and annexed at Exhibit "A" to the plaint. In paragraph 8 of the plaint, it is suggested that in the first week of June, 2006 the Defendant informed the Plaintiff about his being ready to complete the same and that accordingly the Plaintiff arranged for a draft agreement to be prepared and stamped. It is crucial to note that in the second recital to this draft agreement prepared by the Plaintiffs, the area of the flat, of which specific performance is sought, is specifically mentioned as 674.44 sq. ft. (the reference to sq. mtrs. is an obvious mistake). The schedule to the agreement

also expressly states the measurement of the flat to be 674 sq. ft. (through error again mentioned as sq. mtrs.). In fact, the figure of 674.44 is the corrected figure. The figure of 645.44 was corrected by hand to read 674.44.

11. Thus, it is clear that the Plaintiff himself presumed that what he was purchasing was 674.44 sq. ft. There is not a whisper anywhere in the plaint that 674.44 sq. ft. was a typographical error. There is not a whisper in any of the documents that the actual figure was about 900 sq. ft.

12. Admittedly, the suit flat has an additional room as a result of the society having availed of the additional FSI that was available. Thus, even assuming that the consideration was correctly filled-in, the parties, to say the least, were not even ad-idem as to the property which was the subject matter of the agreement. A difference of 250 sq. ft. is undoubtedly a substantial difference in the subject matter of the suit. Even assuming that specific performance would be granted, it could only be of 674.44 sq. ft. and not the entire flat as it now exists.

13. That the Plaintiff himself never contemplated the purchase of a flat in excess of 674.44 sq. ft. is further clear from the pleadings in the Bombay City Civil Court which are also annexed to the plaint itself. In the City Civil Court the Defendant had filed an affidavit stating that, in fact, the consideration arrived at was Rs.90,00,000/-. On the date of the execution of the alleged agreement dated 11.4.206 the additional FSI was being conferred by the society and an extra room was being added to each and every flat. The construction of the extra room was in progress. The figure of Rs.71,31,000/- was therefore never arrived at. What is important to be noted is that in the rejoinder to this in the City Civil Court, the Plaintiff once again did not even remotely suggest that it was agreed between the parties that even the additional construction was to be sold at the same price.

14. Faced with this, it was suggested by Mr.Kini that the lesser area may have been mentioned for the purpose of avoiding payment of the full stamp duty. This suggestion, however, does not find any place in

the pleadings. I am not sure that if a party had taken such a stand, he would be entitled to specific performance in any event.

15. Mr.Kini then submitted, relying upon paragraph 6 of the affidavit in reply, that both the parties were aware that additional area would be made available in the near future. If, in fact, there was any concluded agreement on 11.4.2006 in this regard, it would obviously have been reflected in the writing dated 11.4.2006. There was not a whisper about it in the agreement dated 11.4.2006. This, indeed, establishes more than one thing. Firstly, it belies the Defendant's case that the figure of Rs.71,31,000/- was ever agreed upon. Secondly, it establishes that the Plaintiff himself never contemplated purchasing the additional area. This is further buttressed, as noted above, by the fact that even in June 2006 the draft agreement prepared by the Plaintiff, and forwarded to the Defendant mentioned the area of 674.44 sq. ft.

16. Faced with all this, Mr.Kini submitted that, in any event, the additional area ought to enure to the benefit of the Plaintiff as it forms a part of the

flat agreed to be purchased.

17. I am unable to agree. There is no rule of law or equity which would justify such a contention. This is not even pleaded by the Plaintiff. In fact, this circumstance by itself would justify a Court in refusing specific performance not merely on the ground that the Plaintiff has not claimed such a relief but also on the ground that, in that event, specific performance ought not to be enforced in view of section 20 of the Specific Relief Act.

18. The reasons given in paragraph 10 of my order dated 4.9.2006 apply with equal force. The Defendant is 82 years old. He has been through a serious illness. His condition has only been worsened by the present litigation. The grant of any injunction would seriously jeopardise his physical and financial condition. On the other hand, the Plaintiff would not suffer any harm or injury if the injunction is refused. The agreement was terminated on 22.6.2006. I see no reason why in such circumstances the Plaintiff ought not to be relegated to a claim for damages.

19. In view of what I have held, it is not necessary to go into the various other defences raised by the Defendant.

20. The Notice of Motion is dismissed. The statement made before the Appeal Court shall continue till 5th February, 2007 to enable the Plaintiff to challenge the order.

21. The original of Exhibit "A" as tendered by the Plaintiff and the xerox copy which was taken on record and marked ‘X’ shall be kept in a sealed cover and shall be retained by the Prothonotary and Senior Master.